

**ESTATES – SALES AND OTHER TRANSFERS OF ESTATE REAL PROPERTY INVOLVING
PERSONAL REPRESENTATIVE; PROPOSED LEGISLATION**

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1. SUMMARY

There are differing views regarding when and under what circumstances an executor, or personal representative ("P.R.") as an executor is called, can sell or otherwise transfer title to real property. It is believed that the following is how the law works. A more detailed discussion is set out in 2. through 5. below.

If the will *directs* the P.R. to sell real property and does not limit that direction except to say that the P.R. can do what he deems best, the P.R. can sell without a court order.

If *T* devises title to the *P.R.* and the will incorporates either all of G.S. 32-27's powers or G.S. 32-27(2)'s powers, the *P.R.* can sell, exchange, give options upon, partition or otherwise dispose of the title or any interest therein without a court order. G.S. 32-27(2); *Montgomery v. Hinton*, discussed in 2. below.

If in clause 1 of *T's* will, *T* devises *Blackacre* to, for example, *T's* children and in clause 5 grants to the *P.R.* all of G.S. 32-27's powers or G.S. 32-27(2)'s powers, but no other powers, the *P.R.* *cannot* sell, exchange, give options upon, partition or otherwise dispose of the title to *Blackacre* or an interest therein unless the *P.R.* obtains a court order or joins in a conveyance with *T's* children (and spouses) under G.S. 28A-17-12. *Montgomery v. Hinton*, discussed in 2. below. G.S. 28A-17-12 is discussed in 4. below.

If in clause 1 of *T's* will, *T* devises *Blackacre* to, for example, *T's* children and in clause 5 grants to the *P.R.* "the power to sell, convey, mortgage, lease or otherwise transfer any and all of my property as he deems in the best interests of my estate, without a court order," the *P.R.* may do so, without the joinder of any one else. This is true even through clause 1 is not made expressly subject to clause 5 and/or clause 5 is not expressly set forth "notwithstanding clause 1." This would also be true if clause 5 did *not* say, "without a court order," since "without a court order" would be implicit – otherwise, the power would not need to exist. G.S. 28A-13-3(a)(27); G.S.28A-13-3(a)(31); G.S. 28A-17-8, discussed in 2. below. However, if the will goes on to say "the power can be exercised by the *P.R.* if it will facilitate the setting of my estate," and a sale is not needed to do so, *James v. James*, discussed in 2. below, prohibits the sale.

A *P.R.* has all powers in G.S. 28A-13-3(a) except as qualified by express provision in the will or in a court order. Powers in G.S. 32-27 must be incorporated into the will.

In addition to the examples above, if *T* devises title to *T's* children and incorporates all of G.S. 32-27's powers or incorporates G.S. 32-27(12)'s power to borrow money, the *P.R.* can borrow money secured by a deed of trust on the title for the purpose of paying debts, taxes or other charges against the estate. No court order is required. The power granted by G.S. 28A-13-3(a)(12) can only be exercised under G.S. 28A-17-11 which requires a court order. It would seem that the specially drawn power to mortgage could allow the *P.R.* to mortgage, without a court order, land devised to beneficiaries.

When selling, leasing or mortgaging real property of the estate is necessary to make assets to pay debts or claims against the estate, a special proceeding under G.S. 28A-17-1, et. seq, is required if the will does not grant the power. G.S. 28A-15-1(c).

With respect to *P.R.'s* power to sell, convey, mortgage, etc., without a court order, the law should be made express, by amendment. See 5. below.

A lien against an heir or devisee will be subject to a P.R.'s right to sell, at least if the sale is to make assets to pay debts of the decedent and pursuant to a court order and perhaps if the sale is pursuant to a power of sale in the will exercised for such purposes. The law is in need of clarification. See 3. below for the law and see 5. below for proposed legislation.

Heirs or devisees can convey during administration with the consent of the P.R. as outlined in G.S. 28A-17-12, discussed in 4. below. If the first publication or posting of general notice to creditors occurs within two years of the decedent's death and the transfer is made after the first publication or posting and before the approval of the final account and the P.R. joins with the devisees or heirs in the transfer, the transfer is valid and cannot be set aside by the P.R. or the creditors of the estate. The provision has no effect on liens.

2. ESTATES – SALES AND OTHER TRANSFERS BY THE P.R. PURSUANT TO P.R.'S POWERS – DETAILED DISCUSSION

Chapter 28A and Chapter 32 of the General Statutes and certain cases have caused some confusion regarding when a personal representative of the estate (often called an executor or executrix when there is a will) or "P.R." can sell real property, whether that sale can be made without a court order or requires a court order and whether the devisees must join in the execution of the conveyance. Similar problems exist with other real property transfers by the P.R. Proposed legislation is discussed in 5. below.

G.S. 28A-13-3(a) states that, except as qualified by express limitation in the will or in a court order, and subject to G.S. 28A-13-6 pertaining to powers of joint P.R.s, a personal representative ("P.R.") has the power to reasonably and prudently perform every act incident to collection, preservation, *liquidation*, or *distribution* of a decedent's estate so as to accomplish the result of estate settlement and distribution as provided by law, including, but not limited to, G.S. 28A-13-3(a)(1)'s power to take possession, custody or control of real property, subject to G.S. 28A-13-3(c)'s requirements to file a petition and obtain a court order in order to take possession, custody or control.

G.S.28A-13-3(a)(27)'s power to sell or lease real property also references procedures specified in Article 17 of Chapter 28A pertaining to a petition to sell property under G.S. 28A- 15-1 to pay estate debts and claims and obtaining the resulting order of sale specified in G.S. 28A-17-7. Heirs and devisees are necessary parties. G.S.28A-17-4. Any heir or devisee not joined can subsequently assail the proceeding's validity. *Dickens v. Long*, 109 N.C. 165, 13 S.E. 841 (1891). An adverse claimant, such as a party holding a judgment lien against the decedent, may be made a party. G.S. 28A-17-6. If such a claimant is made a party, he is bound by the order. If he is not made a party, he is not so bound. It is best to join such a claimant and ask for an order selling the title free and clear of the claimant's interest, since Chapter 28A does not spell out a "free and clear of liens" procedure.

G.S. 28A-13-3(a)(31) states that the P.R. can exercise such additional *lawful* powers as contained in the will which seems to refer to powers referred to in G.S. 28A-17-8.

G.S. 28A-13-3(a)(27), cited above, in referring to Article 17 of Chapter 28A, also refers to G.S. 28A-17-8. G.S. 28A-17-8 states that a sale of real property made pursuant to authority given by will may be either public or private, unless the will otherwise directs, and may be on such terms as in the opinion of the P.R. are most advantageous to those interested in the estate. There is no requirement for a court order. There is no requirement that the sale be for making assets to pay debts of or claims against the estate. However, the statute seems to include such a sale.

G.S. 28A-15-1 pertains to "assets of the estate generally." G.S. 28A-15-1(a) provides that real property of the decedent is available for discharge of debts and other claims against the estate, if the P.R. determines it is in the best interest of the administration of the estate. G.S. 28A-15-1(b) contains a similar precondition regarding a sale to make assets to pay debts and claims of the estate. G.S.28A-15-1(c) provides that if the P.R. determines that it is in the best interest of estate administration to sell, lease, or mortgage real property to pay estate debts and claims, the P.R. *shall* institute a special proceeding under G.S. 28A-17-1, et seq. to do so, *except* that no such proceeding is required for a sale made pursuant to authority granted by the will. In 1985, a next sentence was added to G.S. 28A-15-1(c) as follows: "*A general provision granting authority to the personal representative to sell the testator's real property, or incorporation by reference of the provisions of G.S. 32-27(2) shall be sufficient to eliminate the necessity for a proceeding under Article 17.*" (If a proceeding has been instituted pursuant to G.S. 28A-13-3(c) to take possession, custody or control of estate real property as discussed above, the P.R. may petition for sale, lease or mortgage as part of that proceeding and is not required to institute a separate special proceeding.)

Before discussing the 1985 addition's reference to G.S. 32-27(2), a threshold question must be answered. G.S. 28A-15-1's reference to assets being available for discharge of debts and other claims, including the references in G.S. 28A-15-1(c), and the statement that a court order to do so is not required for a sale made pursuant to authority set out in the will, merely establishes the rule for a sale to make assets to pay debts and claims. These references do not mean that other express powers set out in the will pursuant to which the P.R. can sell real property *for reasons other than to make assets to pay debts and claims* cannot be exercised without a court order, since the terms of the will would control.

See G.S. 28A-13-3(a)(31);G.S. 28A-13-3(a)(27); G.S. 28A-17-8. Consider the following EXAMPLE: if *T* devises real property to *D* in clause 1 of the will but in clause 5 appoints *E* as executor and states, "my executor has full power and authority to sell, mortgage, convey, lease or otherwise transfer my real property without court order," no court order to sell the property devised in clause 1 would be needed. This would also seem to be the case if the words "without court order" are omitted. If there is no such express power in the will, further consideration is required, particularly if only G.S. 32-27 powers are incorporated into the will pursuant to G.S. 32-26, as *Montgomery v. Hinton* illustrates.

Montgomery v. Hinton, 45 N.C. App. 271, 262 S.E. 2d 697 (1980), dealt with a will that devised real property to *B* and granted the *P.R.* all of the powers in G.S. 32-27. G.S. 32-27 contains G.S. 32-27 (2). G.S. 32-27(2) is a power to sell, exchange, give options upon, partition or otherwise dispose of any property or interest therein "which the fiduciary may hold from time to time," with or without a court order, at public or private sale, upon such terms and conditions and for such consideration as the fiduciary shall deem advisable, and to transfer and convey the property or interest therein in fee simple or otherwise, and the party dealing with the fiduciary shall not be under a duty to follow the proceeds. The court held that G.S. 32-27(2) was not applicable since the *P.R.* was not devised title. Therefore, the *P.R.* did not "hold" title under G.S. 32-27(2). *B* did under G.S. 28A-15-2(b). The *P.R.* could not use the power to sell and should have pursued a special proceeding to sell.

The *Hinton* court dealt specifically only with G.S. 32-27(2)'s power. The court did not specifically deal with any other power, including G.S. 32-27(3)'s power, to "Invest and Reinvest." This power includes the power to "invest and reinvest" in any real or personal property and other assets. Should the *Hinton* court have held that G.S. 32-27(3) permitted the sale? Under G.S. 32-27, when it comes to the sale of real property, is G.S. 32-27(2) exclusive, or can G.S. 32-27(3) be considered? G.S. 32-27(2) clearly refers to a power to sell, whereas such power under G.S. 32-27(3) would have to be implied as is discussed in the cases below. However, G.S. 32-27(2) could be construed to apply when the executor "holds" title. Therefore, if otherwise appropriate, a power to sell when title is not held by the *P.R.* could be implied under G.S. 32- 27(3). There is nothing in G.S. 32-27 or G.S. 32- 27(2) to indicate that G.S. 32-27(2) is the only portion of G.S. 32-27 that can be utilized. If G.S. 32-27(3) should have been considered in *Hinton*, a review of possibly relevant cases dealing with trusts is in order.

In *Morris v. Morris*, 246 N.C. 314, 98 S.E. 2d 298 (1957), *T's* devise was to *W* of "all of property both real and personal to provide for my son...and herself." The Supreme Court held that *W*, to whom "herself" in the devise referred, held the property in trust for her son and herself but that she had no power to sell realty without a court order.

In *First Union National Bank of North Carolina v. Broyhill*, 263 N.C. 189, 139 S.E. 2d 214 (1964), *T's* will created a trust. The devise to the trustees required the trustees to divide assets into four equal shares and be administered as four separate trusts. The children were to receive the income during life. Additionally, the trustees, in their exclusive discretion, had the power to invade and pay out of the principal such amounts as may be necessary to provide each child with sufficient funds for support provided that the trustees took into consideration other resources that the child had available. The trustees had the power to disburse to grandchildren for support. The will granted no express power of sale. The issue was whether a power to sell without a court order was implied. The power need not be express. It can be implied. The executor was granted the power to sell all or any part of the real property at public or private sale on such conditions deemed expedient to the executor, but no such express power was given to the trustees. And, the trustees were given no power or direction to invest and reinvest the estate assets as in other reported cases. Therefore, the court held that there was no express or implied power of sale. Among the cases cited was *Hall v. Wardell*, 228 N.C. 562, 46 S.E. 2d 556 (1948).

In *Hall v. Wardell*, *T's* will provided that (1) the property was devised to *W*, the wife, to be held and income to be used by *W* during *W's* life, the principal to be invested and kept invested by *W* as she deemed best; and (2) the property after the death of *W* passed to two trustees to keep the property invested as they deemed best; and (3) *W* may use the property as she wished for certain purposes with the residue to be used by the trustees as set out above. The court held that a power of sale was implied from the will's language and stated that the power to invest and consume the principal, or to invest and manage the estate or to invest and keep invested the consumed principal implied a power to sell.

In sum, it would appear that the court in *Montgomery v. Hinton* could have used G.S. 32-27(3). That statute seems to imply a power of sale. However, the court may have been disinclined to do so because it may have believed that G.S. 32-27(2) was exclusive as to such matters. It is not, expressly. G.S. 32-27 should be clarified. To the extent that *Montgomery v. Hinton* is a problem, G.S. 28A-15-1(c) does not eliminate the problem by referring to G.S. 32-27(2) since, under G.S. 32-27(2), the executor must still "hold" title.

When trying to ascertain whether the P.R. can sell without a court order, sometimes the will can say too much. In *James v. James*, 58 N.C. App. 371, 293 S.E. 2d 655 (1982), the will gave the P.R.s : "the full power and authority to sell in such manner as they in their sole and absolute discretion may determine to be proper any and all property described in the second item of my will and to convey good title to the purchaser or purchasers." 58 N.C. App. 371, 374. If the will had said no more, the executors could have sold the property without a court order. However, the will continued: "This authority shall not be obligatory upon my executors but can be exercised by them if in their judgment such a procedure will facilitate the settling of my estate." 58 N.C. App. 371,374. The court held that since the executors' discretion to sell was limited to matters which would facilitate the settlement of the estate, the sale, to avoid a partitioning proceeding, was not a valid exercise of the power of sale and did not divest the petitioners-devisees of their interest in the real property. 58 N.C. App. 371, 375. See A. Grant Whitney, *Estate Considerations in Real Estate Transactions*, VIII-I, et. seq. (N.C.B.A. Real Property Sec. Meeting Manuscript, 1987).

Pursuant to G.S. 28A-17-9, if a decedent has contracted to sell real property his P.R. may execute and deliver a deed pursuant to the contract. No court order is required.

G.S. 28A-17-10 states that when real property is *conveyed* to a P.R. for the benefit of the estate he (or a successor representative) may sell and convey it upon terms that the P.R. deems just for the estate pursuant to Article 29A of Chapter 1 entitled "Judicial Sales." But, it would seem that a power of sale set forth in a *devise* in a will is not governed by this statute. Also, the article on judicial sales seems to require a court order.

Other powers in G.S. 32-27, which can be incorporated by reference into a will or trust, are G.S. 32-27(8) (management of real property) and G.S. 32-27(12) (borrowing money and mortgaging). G.S. 32-27(12) is limited to paying taxes, debts and claims of the estate. G.S. 32-27(12) does not require that title be vested in the P.R., unlike G.S. 32-27(2), and G.S. 32-27(12) does not require a court order, unlike G.S. 28A-13-3(a)(12). Other provisions of G.S. 28A-13-3 which should be noted are G.S. 28A-13-3(a)(7) (relinquishing rights in property when it is valueless or of no benefit to the estate) and G.S. 28A-13-3(a)(12) (borrowing money and mortgaging). The power in G.S. 28A-13-3(a)(12) is limited to securing loans by mortgaging estate property in order to pay debts, taxes, and other claims against the estate. G.S. 28A-17-11 is expressly made applicable by G.S. 28A-13-3(a)(12). G.S. 28A-17-11 requires a petition to and an order from the clerk of superior court.

With respect to borrowing money with security as permitted by G.S. 28A-13-3(a)(12) and G.S. 28A-15-1(c) as well as under other authority such as G.S. 32-27, *Hunter v. Newsom*, 121 N.C. App. 564, 468 S.E. 2d 802 (1996), held that a deed of trust given by an executor as executor and individually was invalid since it did not secure a debt of the estate incurred for purposes of paying estate debts and taxes. The court cited the following will provision: "I hereby grant to my Executor...continuing absolute discretionary power to *deal with* any property, real or personal, held in my estate..., as freely as I might in the handling of my own affairs. Such power may be exercised independently and without prior or subsequent approval of any court or judicial authority and no person dealing with the Executor...shall be required to inquire into the propriety of any of. ..[his] actions." (Emphasis added.) The court held that "we do not read this language as extending any additional authority or power to the executor and cannot be interpreted to authorize any act which is not otherwise authorized."

3. ESTATES – SALES AND OTHER TRANSACTIONS BY P.R. AND LIENS AGAINST HEIRS OR DEVISEES- DETAILED DISCUSSION

In certain cases, a judgment or lien will be docketed against a person who subsequently becomes an heir or a devisee. When the decedent dies, to what extent does such a judgment or lien affect the title to the decedent's real property inherited by the heir or received by the devisee?

A devisee or an heir acquires title to real property subject to the personal representative's right to sell the real property for estate purposes pursuant to the estate administration laws of North Carolina. G.S. 28A-13-3(a)(1); G.S. 28A-13-3(a)(27) (referring to Article 17 of Chapter 28A); G.S. 28A-13-3(a)(31); G.S. 28A-13-3(c); G.S. 28A-15-1; G.S. 28A-17-8; *Linker v. Linker*, 213 N.C. 351, 196 S.E. 329 (1938); *Wadford v. Davis*, 192 N.C. 484, 135 S.E. 353 (1926). The devisee or heir will have title until the personal representative's power to sell is exercised, in which case the purchaser's title relates back to the decedent's death. See, generally, C.J.S. *Executors and Administrators* §148. It would seem that if a personal representative is exercising a statutory power to sell real property to pay debts of the decedent or is exercising a power of sale in the will in order to do so, the sale of the land would be free and clear of the judgment lien against the heir or devisee. This would be because the interest of the judgment lienor should rise no higher than the interest of the heir or devisee. There is no clear and express statutory provision to that effect in existing Chapter 28A,

however. This concept is discussed in *Linker*, supra, and *Wadford* and in E. Urban, G. Whitney and N. Ferguson, *North Carolina Real Estate* §13-43 (Thomson * West, supp. 2006).

In *Wadford*, the explanation, citing old C.S. 56, is that when land of the estate is sold to make assets to pay debts, the proceeds of the sale necessary to pay the debts of the estate are considered personal property and the surplus proceeds of the sale constitute real estate. Therefore, all proceeds generated by a sale which are not necessary to pay debts and administration charges shall be considered real estate and shall be paid by the executor or administrator to those persons who would have been entitled if the land was not sold. In the proceeding, the executor filed an action and joined all of the devisees. The court stated that the judgment creditors of the devisee had liens on the land that the testator devised to the devisee subject to all valid claims of the estate and its creditors.

Linker, involving an intestate administration, reiterated the proposition that when land is sold to make assets to pay debts the proceeds necessary to pay debts are personal property and the surplus proceeds go to the heirs of the land, as, in effect, land, as if the land had not been sold. The court cited old C.S. 56. The court went on to state that judgment creditors of an heir are entitled to pro-rata payment out of the heir's share. In other words, under the judgment priority statute, the judgments among themselves do not have priority against each other but there is pro-rata sharing. In such a case, the judgments have equal priority since they attached at the same time.

After such a sale of the land, logic dictates and the cases indicate that the purchaser of the land from the P.R. takes title free of such judgment liens against an heir or devisee even though surplus proceeds, in the nature of land pursuant to the cases, are not distributed until later or, due to misfeasance or nonfeasance of the personal representative, not at all. This results because of the passage of title free of the liens and the conversion of the land into cash, part of which is in the nature of personal property to pay debts of the decedent and part of which is in the nature of land for the heirs, devisees or lienors, as the case might be.

As to procedure, if it is determined by the personal representative that it is in the best interest of the administration of the estate to sell property to pay debts against the decedent's estate, the personal representative shall institute a special proceeding under Article 17 of Chapter 28A, except that no proceeding is required for a sale made under authority given by a will, according to G.S. 28A-15-1(c). Any existent heir or devisee is a necessary party to the special proceeding. G.S. 28A-17-4. When the real property, or any interest therein, is claimed by another person, such claimant may be made a party to the proceeding and may become a party on his own motion. G.S. 28A-17-6. Persons holding liens docketed against an heir or devisee may be made parties. They are not necessary parties. Following other areas of the law, if they are not made parties, they are not bound by the proceeding and can later litigate legal issues. However, it is uncertain that this would be the result under Chapter 28A, so the best course would be to make such lienors parties.

However, as G.S. 28A-15-1(c) points out, a power granted to a personal representative in a will does not require an Article 17 special proceeding. It seems that if the will grants a personal representative (1) a clear and broad power to sell the land of the decedent under any circumstances and this power is being exercised to create assets to pay debts and expenses of the estate or (2) a clear precise power to sell land to make assets to pay such debts and expenses and the power is exercised for such purpose, the personal representative could exercise the power of sale, the grantee would acquire title free of any lien previously docketed against an heir or devisee and, to the extent the sale proceeds were not necessary to pay debts and expenses of the estate, the liens against heirs or devisees would be paid in accordance with the above cited cases.

Chapter 28A also allows the personal representative to mortgage estate property under the circumstances provided in G.S. 28A-15-1(c), G.S. 28A-17-11 and G.S. 28A-13-3(a)(12). The statutes are silent as to whether a mortgage or deed of trust placed on land by the personal representative will have priority over liens previously docketed against an heir or devisee. It would seem that such a mortgage or deed of trust should have priority, whether the mortgage or deed of trust is placed on the land pursuant to a clear power in the will or pursuant to an Article 17 proceeding, as long as the loan is obtained to pay debts and expenses of the estate. Until the statutes are clarified, the safe course would be to institute a special proceeding and join heirs, devisees and the lienors for a complete determination of rights and priorities.

How would a power of sale contained in a will where the personal representative is granted the clear discretionary power to sell the decedent's real property without a court order for reasons other than to pay debts of the estate; for example, to sell real property for the best price and to distribute proceeds to the heirs or devisees, be viewed? The statutes are unclear. The above cited cases do not clearly and directly apply. It seems that if there are funds

generated by the sale sufficient to pay all liens against the heirs or devisees, the appropriate solution is for those liens to be paid and cancelled of record as a result of the personal representative's sale. Where the sale proceeds are not enough to pay and cancel of record all such liens, there is more of a concern. It seems that since the heir's or devisee's real property is subject to such a discretionary power of sale for such purposes, so should be the interests of those lienors. Such sales are not within the holding of the cases described above, however. Further, a mortgage or deed of trust given by the personal representative for such purposes could be a problem.

When real property is distributed to the heirs or devisees without being sold during administration, the prior liens against the heirs or devisees would attach with equal priority. G.S. 28A-15-2(b); G.S. 1-233; G.S. 1-234.

It is noted that a prior *federal tax lien* attaches to subsequently acquired real property of an heir or devisee, but it is believed that such attachment would be subject to the principles set forth above, at least in some cases. See 26 U.S.C. §6321 (lien attachment), and Plumb, *Federal Tax Liens*, p. 26 (ALI/ABA 1972, supp. 1974). However, a recent U.S. Supreme Court case, *In Re Drye, Jr.*, 528 U.S. 49, 120 S.Ct. 474 (1999), might or might not change that result. In that case, the taxpayer disclaimed his interest in his mother's estate. The Supreme Court found that the taxpayer's power to disclaim or renounce an interest in the estate (and thereby channel it to a close family member) "warrants the conclusion that [the taxpayer] held 'property' or a 'right to property' subject to the Government's lien." It seems fair to argue that if the P.R. is also the devisee-taxpayer, or heir-taxpayer and uses the P.R.'s power to sell to avoid the attachment of a federal tax lien, a court could follow the reasoning in the above cited U.S. Supreme Court decision and allow attachment of the federal tax lien. On the other hand, the result might be different if the P. R. exercising the power of sale is a party other than the delinquent tax payer.

The author in 2002 proposed additions to G.S. 28A-15-2(b) which have found their way into proposed legislation discussed in 5. below.

4. ESTATES- SALE, LEASE OR MORTGAGE BY HEIRS OR DEVISEES- DETAILED DISCUSSION

(a) If the first publication or posting of the general notice to creditors as provided for in G.S. 28A-14-1 occurs within two years after the decedent's death – G.S. 28A-17-12(a).

G.S. 28A-17-12(a) deals with any sale, lease, or mortgage of real property ("transfer") by heirs or devisees of any resident or non-resident decedent. G.S. 28A-17-12(a) deals with two situations.

First, if the transfer is made after the decedent's death and *before* the *first* publication or posting of the general notice to creditors under G.S. 28A-14-1, the transfer is *void* as to creditors and the personal representative (the "P.R."). G.S. 28A-17-12(a)(1). Even though the P.R. joins in the transfer, a creditor can use this rule.

Second, if the transfer is made *after* the first publication or posting and *before* the approval of the final account under G.S. 28A-21-2, the transfer is *void* as to creditors and the P.R. unless the P.R. joins in the transfer. G.S. 28A-17-12(a)(2). If the P.R. is not granted a power in the will to make transfers of title to real property or has not obtained a court order to do so, it would seem that the P.R. could still join in the transfer under G.S. 28A-17-12(a)(2), since no statute in Chapter 28A expressly restricts G.S. 28A-17-12(a)(2). G.S. 28A-13-3(a) sets out a non-exclusive list of powers. None of those powers expressly refers to G.S. 28A-17-12. See G.S. 28A-13-3(a)(1), (7), (12), (27), (31) and (32). However, in reference to a sale or lease, G.S. 28A-13-3(a)(27) refers to all of Article 17 of Chapter 28A. G.S. 28A-13-3(a)(32) states that the P.R. can execute all documents, which will accomplish the exercise of the powers vested in the P.R. This could include the power in G.S. 28A-17-12(a)(2), if the P.R.'s joinder under that statute is deemed a power. G.S. 28A-15-1 does not expressly limit the P.R.'s right of joinder under G.S. 28A-17-12(a)(2). G.S. 28A-17-12(a)(2)'s power is not expressly made subject to the provisions and conditions of G.S. 28A-15-1 or to any other provision of Article 17 of Chapter 28A. Devisees and heirs cannot complain since *their* transfer of title under G.S. 28A-17-12 is at issue. Creditors *are* in a position to complain. It is somewhat arguable that the P.R. must exercise some standard of care to be joining in the transfer in the "best interest of the administration of the estate." Any purchaser, lessee, or lienor, giving value should be protected under G.S. 28A-17-12(a)(2) to the extent of value given if the person has no actual knowledge of a P.R. not acting in the best interests of the estate.

There is no impact upon an existing lien of a creditor of the decedent or of the estate by a valid transfer under G.S. 28A-17-12(a)(2). G.S. 28A-17-12(a)(2) governs only the issue of whether the *transfer* is valid as against the creditor. A valid transfer *is subject to*, and not free and clear of, the creditor's lien. A creditor's lien can include a judgment lien, a federal tax lien, a deed of trust or any other lien. G.S. 28A-17-12(a)(2) relates to a transfer of title by an heir or devisee.

If land is to be transferred "free and clear" of a lien, it will have to be done by the P.R. transferring the title, probably by virtue of an order as discussed in 2. above. Also, G.S. 28A-19-3, pertaining to "limitations on presentation of claims," contains G.S. 28A-19-3(g) which states that nothing in that section pertaining to presenting claims under G.S. 28A-19-1 affects or prevents any action or proceeding to enforce any mortgage, deed of trust, lien (including a judgment lien) or security interest. Only the right to a deficiency judgment is affected by failure to comply with the claims making procedure of Article 19 of Chapter 28A. Stating that G.S. 28A-17-12(a)(2) has no effect on liens appears compatible with G.S. 28A-19-3(g).

A lien against an heir or devisee would attach to the heir's or devisee's title vesting in the heir or devisee. G.S. 28A-15.2(b); G.S. 31-41. G.S. 28A-17-12(a)(2) considers the fact that the transferring parties might be heirs or devisees as to particular land or heirs as to a portion of the land and devisees as to another portion. A probated will determines that title is vested in a devisee. If title is not devised to any devisee, title vests in the heirs. G.S. 28A-15-2(b) and G.S. 31-41. Also see G.S. 31-38 and G.S. 31-40 (title presumed in fee; what property passes by will). G.S. 31-12 and G.S. 31-39 require probate of a will in order to pass title and deal with the conflict between title derived from heirs as versus title derived from devisees.

When is a transfer deemed "made" under G.S. 28A-17-12(a)? G.S. 28A-17-12(a) seems to refer to when the transfer is deemed "made" as between a the grantor and a grantee. That would be when a valid transfer document is delivered to the grantee, which is a date perhaps earlier than the date of the transfer document's recordation.

(b) If the first publication or posting of the general notice to creditors as provided for in G.S. 28A-14-1 does not occur within two years after the decedent's death – G.S. 28A-17-12(b).

G.S. 28A-17-12(b) deals with the same type of transfers by the same *type* of heirs or devisees as does G.S. 28A-17-12(a) discussed in (a) above. However, the *timing* of the transfer described in G.S. 28A-17-12(b) is different. If the first publication or posting of notice does *not* occur within two years of the decedent's death, a transfer by the heirs or devisees made after that two year period is valid, without the joinder of the P.R. G.S. 28A-17-12(b) does not expressly require that the transfer take place *after* that period. Therefore, it is possible that if the notice does not occur within the two-year period *and* a transfer is made within the two-year period by the heirs or devisees, the transfer will be valid. The statute should be amended to clarify how G.S. 28A-17-12(b) operates in this instance.

Comments in (a) above regarding the necessity of probate, conflicts between purchasers from heirs and purchasers from devisees, the fact that liens are unaffected and when a transfer is deemed "made" also apply to a transfer under G.S. 28A-17-12(b).

(c) Conclusion

G.S. 28A-17-12 relatively unambiguous. There is only a limited need for clarification. A conflict between (1) a transfer document given by heirs or devisees and (2) a transfer document given by only the P.R. pursuant to a power of sale would seem to be resolved by priority rules under the recording act set forth in G.S. 47-18; and G.S. 47-20. If not, an amendment to the statutes might be needed.

5. ESTATES – SALES BY P.R.S – PROPOSED LEGISLATION- DETAILED DISCUSSION

In March, 2001, House Bill 716 was introduced in an effort to clarify when a P.R. has the power to transfer title to real property or an interest therein. The General Statutes Commission undertook a review of the bill. It went through several drafts. Several memoranda compiled by Graham Holding, Esq. of Charlotte, representing the Estate Planning and Fiduciary Law Section of the NCBA and the author, representing the Real Property Section of the NCBA (and the NCLTA) were submitted. Cutting to the chase, as they say, the bill was killed by the Administrative Office of the Courts.

A new effort is being made to introduce a new bill, with much of the contents of House Bill 716 surviving, but with even more notice provisions for additional protection of devisees.

The proposal to amend G.S. 28A-13-3(a)(1) in regard to taking possession, custody or control of real property of the decedent allows not only G.S. 28A-13-3(c), which currently requires a court order, to be used but also refers to proposed 28A-13-3.1 which would allow taking possession, custody or control pursuant to a power in the will—without a court order.

The proposal to amend G.S. 28A-13-3(a)(12), pertaining to the P.R. borrowing money and securing the loan with a deed of trust if a court order is obtained pursuant to G.S. 28A-17-11, would also add the power to act without a court order if the will so provided under proposed 28A-13-3.1.

The proposal to amend G.S. 28A-13-3(a)(27), pertaining to the power to sell real property pursuant to a court order under Article 17 of Chapter 28A, adds the power to act without a court order under, proposed 28A-13-3.1.

The proposed amendment to G.S. 28A-13-3(c) is to make it clear that this subsection is subject to proposed 28A-13-3.1's provisions for acting without a court order. In other words, if the proposal is enacted, the P.R. will have to obtain a court order to take possession, custody or control of the real property unless the authority to do so is granted to the P.R. in the will under proposed 28A-13-3.1.

The proposal contains a new 28A-13-3.1. It is the heart of the proposal. Therefore, it is set out in its entirety as follows, and is followed by our comments:

"§ 28A-13-3.1. Power of personal representative to deal with real property without a court order.

- (a) A personal representative may, without court order, take possession, custody, and control of the decedent's real property and sell, exchange, give options upon, partition, lease, mortgage, or otherwise dispose of the property to the extent the will expressly grants any of these powers to the personal representative by any of the following grants of power:
 - (1) Incorporation by reference of the powers in G.S. 32-27 when title to the real property is devised to the personal representative.
 - (2) An express power granted to the personal representative in the will when title to the real property is devised to the personal representative.
 - (3) An express power granted to the personal representative in the will when title to the real property is not devised to the personal representative, if the decedent specifically indicates an intent that the power applies to that real property. For purposes of this section, provisions in the will stating that the power applies to the real property "whether or not title is devised to the personal representative" or "even though title is not devised to the personal representative" or other similar language is sufficient to indicate such an intent.
- (b) Any party dealing with the personal representative is not under any duty to follow the proceeds or other consideration received by the personal representative from the disposition of the real property pursuant to the exercise of a power authorized by this section.
- (c) If the power granted the personal representative in subsection (a) is not exercised within two years after the death of the decedent, all sales, leases, or mortgages of the real property by the devisees of any resident or nonresident decedent shall be valid as to the creditors and personal representative of the decedent. The personal representative may waive the power granted in subsection (a) by a writing signed by the personal representative and filed in the office of the clerk of superior court in the county where the estate is being administered."

Proposed 28A-13-3.1(a)(1) and (2) deal with a situation where the title to real property is devised to the P.R. This is somewhat unusual in contrast to when a will devises title to a testamentary trust. Proposed 28A-13-3.1(a)(1)'s reference to G.S. 32-27 expressly takes into consideration the rule of *Montgomery v. Hinton* discussed above in 1 and 2. Proposed 28A-13-3.1(a)(2) is similar to 28A-13-3.1(a)(1) except that in 28A-13-3.1(a)(2), an express power would be needed.

Proposed 28A-13-3.1(a)(3) is the part of the proposal that in the past has caused the Administrative Office of the Courts ("AOC") the most gastric problems, even though this is merely an effort to at once codify existing law *and* make it more express and/or restrictive by using a concept of "specific intent" and defining examples of that intent, and even though the "specific intent" concept was added to allay the AOC's concerns. (It is noted that G.S. 28A-13-3(a)(31) and G.S. 28A-17-8, discussed above in 1 and 2, seem to be ample authority for a sale of real property without a court order if the will so provides.) The AOC's concerns, as best as we are able to tell, are that as long as title is *not* devised to the P.R., a court order should be required notwithstanding the clear intent of the testator because the P.R., in theory, could abuse the P.R.'s power. This seems to disregard the fact that (1) the P.R., chosen by the testator, can presently exercise

a clear power over real property that is specifically devised to devisees pursuant to G.S. 28A-13-3(a)(31) and/or G.S. 28A-17-8; (2) P.R.s in other states have this power; (3) if the P.R. is going to abuse the power, the P.R. could just as easily do so when the P.R. is devised title; (4) the NCUTC, pertaining to trusts, allows trustees holding title to convey, lease or mortgage unless the trust says differently (see G.S. 36C-8-815, G.S. 36C-8-816; and G.S. 36C-1-105(b)); and (5) if the testator's intent is clear, what business is it of the AOC to restrict the testator's will (no pun intended)? After all, *none* of the accomplished professionals in the Real Property Section or Estate Planning and Fiduciary Law Section (who actually practice in this area) are contending, for example, that if there is a devise of real property to devisees and *no* power to sell, mortgage and lease is granted to the P.R., the P.R. should be able to sell, mortgage or lease anyway, even though that is what the NCUTC allows in the context of a trust *unless* the trust says otherwise. See E. Urban, *Trusts-Conveyance Aspects, Including The New North Carolina Uniform Trust Code* (www.AttorneysTitle.com/library/html).

Moreover, Floyd M. Lewis, Esq., Ex Officio Secretary to the General Statutes Commission (G.S.C.) delivered a May 28, 2003 Memorandum to the G.S.C. that had attached a Memorandum to Sen. Daniel Clodfelter and Walter Reagan, Esq. from Graham D. Holding, Jr., Chair, Legislative Committee of the Estate Planning and Fiduciary Law Section of the N.C. Bar Association, and Ed Urban, General Counsel of the North Carolina Land Title Association, and Representative of the Real Property Section of the N.C. Bar Association, dated June 27, 2002. The memo was an extensive analysis of H.B. 716 and the differing views relating to the bill, which, to put it most charitably, destroyed the A.O.C.'s arguments against the bill. The authors of this memorandum pointed out that :

Under the Uniform Probate Code adopted in at least sixteen states, unless the testator provides otherwise in the will, the PR may sell real property without notice, hearing or order of the court. U.P.C. §§ 3-711; 715(23). This is true even though the will does not grant the PR such power.

Another argument of the bill's detractors has been that attorneys drafting wills might not understand the law and the implications thereof. That seems to be an unreasonable concern if the current proposal is enacted. If the A.O.C. still objects to the latest proposal, perhaps the A.O.C might agree with this substitute for proposed §28A-13-3.1(a)(3) set forth above, even though we believe the proposal set out above is sound:

An express power granted to the personal representative in the will when title to the real property is not devised to the personal representative, if the decedent specifically indicates an intent that the power applies to that real property by either (A) expressly making the devise subject to the express power or (B) expressly making the express power applicable notwithstanding the devise or (C) both of the methods in (A) and (B).

As discussed in 1. and 2. above, G.S. 28A-17-8 authorizes a sale pursuant to authority in the will, and this statute is *not* subject to G.S. 28A-15-1(c)'s and G.S. 28A-17-1's restriction to sale to make assets to pay estate debts or claims. G.S. 28A-17-8 is also *not* conditioned upon either acquiring a court order or, as in G.S. 28A-13-3(a)(31), being exercised pursuant to lawful powers. The author presumes that proposed 28A-13-3.1(a)(3) would control over G.S. 28A-17-8 to the extent of 28A-13-3.1(a)(3)'s restrictions, with the latter controlling only that the sale can be public or private and must be, in the opinion of the P.R., on terms most advantageous to those interested in the decedent's estate. In other words, G.S. 28A-17-8 would be operative subject to specific restrictions imposed by 28A-13-3.1(a)(3). Perhaps the following should be added to G.S. 28A-17-8: "This section is subject to the restrictions and conditions in G.S. 28A-13-3.1(a)."

Proposed 28A-13-3.2 and 28A-13-3.3 are set forth as follows:

SECTION 3. Article 13 of Chapter 28A of the General Statutes is amended by adding a new section to read:

"§ 28A-13-3.2. Notice of exercise of power with respect to real property not devised to personal representative.

- (a) If in accordance with G.S. 28A-13-3.1(a)(3) a personal representative intends to exercise a power with respect to real property of the decedent not devised to the personal representative, the personal representative shall give written notice of the personal representative's intent to exercise such power to the devisees of the real property. The notice shall include a description of the real property that is the subject of the notice and a summary of the power the personal representative intends to exercise.
- (b) The notice required under this subsection shall be deemed given when personally delivered or sent by first class mail to the last known address of each known or reasonably ascertainable devisee of the real

property at least thirty (30) days prior to the date on which the personal representative intends to exercise the power.

- (c) If a devisee to whom the notice is to be given is a minor or is incompetent, then the notice shall be delivered or sent to the court-appointed guardian of the devisee or, if a minor has no such guardian, to the parent of the minor.
- (d) The copy of the notice required by subsection (a), together with an affidavit of the personal representative or the attorney for the personal representative to the effect that a copy of the notice was given to each devisee entitled to receive notice in accordance with this section, shall be filed in the office of the clerk of superior court in the county where the estate is being administered prior to the date on which the personal representative intends to exercise the power.
- (e) The affidavit filed pursuant to subsection (d) may be relied upon by all persons as proof of compliance of the personal representative with the notice provisions of this section in absence of actual knowledge of noncompliance by the personal representative with the notice provisions of this section.
- (f) Notice otherwise required under this section need not be given to a devisee who consents in writing to the exercise of the power by the personal representative and files such written consent with the clerk of superior court in the county where the estate is being administered."

SECTION 4. Article 13 of Chapter 28A of the General Statutes is amended by adding a new section to read:

"§ 28A-13-3.3. Reimbursement of devisees for payment of carrying costs.

- (a) If in accordance with G.S. 28A-13-3.1(a)(3), the personal representative sells or exchanges the decedent's real property not devised to the personal representative, a devisee shall be entitled to reimbursement from the net proceeds arising from the sale or exchange of all carrying costs incurred by the devisee before the personal representative took possession, custody and control of the real property.
- (b) As used in this section, "carrying costs" are the amounts paid by the devisee for any of the following:
 - (1) insurance, ad valorem taxes, or other governmental charges or assessments on the real property.
 - (2) reasonable costs incurred to secure or to make necessary repairs to the real property.
 - (3) payment of principal and interest on any indebtedness incurred before the decedent's death that is secured by a lien against the real property. In no case shall carrying costs include betterments to the real property made by the devisee.
- (c) Any devisee claiming reimbursement for carrying costs under this subsection shall present a claim to the personal representative in writing not later than 30 days after the recording of a valid deed executed pursuant to the sale or exchange. If the personal representative determines the claim to be valid and reasonable, the claim shall be paid to the extent there are sufficient net proceeds. As used in this subsection, net proceeds are the gross proceeds arising from the sale or exchange of the real property reduced by expenses of the sale and all amounts paid to discharge any indebtedness secured by liens against the real property; except that any indebtedness secured by a lien against the property that is assumed by the purchaser shall not be deducted in determining the net proceeds arising from the sale or exchange. If the personal representative rejects the claim, G.S. 28A-19-15 and G.S. 28A-19-16 apply.

Apparently, 28A-13-3.2's purpose is to afford a devisee the opportunity to seek reimbursement pursuant to 28A-13-3.3 under circumstances outlined in 28A-13-3.1 (a)(3).

It would seem that the proposal currently being circulated has considerable merit and that there are no serious, well thought out, objections to it. Therefore, it, or something very close to it, should be enacted.